RESPONSE REQUESTED

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 78-1616

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DR. RONNIE ROGERS, ET AL.,
Petitioners

VS.

DR. M. L. BROCKETTE, ET AL.,
Respondents

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

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RESPONDENTS' BRIEF IN OPPOSITION

* * *

OPINION BELOW

Petitioner seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at 558 F.2d 1058, a copy of which is attached as Appendix B to the Petition for Writ of Certiorari, which affirmed the Order of the District Court. The District Court did not write an opinion. However, its Order and Judgment are attached to the Petition for Writ of Certiorari as Appendix C.

JURISDICTION

The formal, procedural requisites would appear to be satisfied in this case.

QUESTIONS PRESENTED

1. Whether Section 21.914 of the Texas Education Code, mandating participation in the federal school

breakfast program in certain situations, conflicts with the federal statute creating the school breakfast program.

2. Whether, assuming a conflict between the state and federal statutes, the supremacy clause operates to invalidate the Texas statute.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provision of the United States Constitution is Article 6, Clause 2, the Supremacy Clause.

The federal statutes involved are 42 U.S.C. §1773, et seq.

The State statutes involved are §§21.914 and 23.26 of the Texas Education Code.

The pertinent regulations are 7 C.F.R. Part 220, et seq.

STATEMENT OF THE CASE

The Petitioners, Garland Independent School District, filed suit in the United States District Court for the Northern District of Texas, Dallas Division, seeking to have §21.914 declared invalid pursuant to the Supremacy Clause of the Constitution of the United States. Petitioners contended that the school breakfast program, 42 U.S.C. §1773, et seq. gave them the power to decide whether to participate in said program and that the Texas Statute, §21.914 Texas Education Code, in mandating participation in certain situations, was invalid as conflicting with federal law. On cross-motion for summary judgment, the District Court ruled that Petitioners lacked standing to sue the State of Texas and that there was no conflict between the State and Federal Statutes.

On expedited appeal, the Fifth Circuit Court of Appeals reversed the District Court on the question of the school district's standing to sue the State of Texas. However, the Fifth Circuit affirmed as to the lack of a conflict between the statutes and ruled that the Texas Statute was consistent with the policy statement set out at 42 U.S.C. §1773(g). Said opinion was rendered on February 2, 1979.

Petitioners subsequently filed a Petition for Writ of Certiorari and this brief is in response thereto.

ARGUMENT AND AUTHORITIES

I.

THERE IS NO CONFLICT BETWEEN THE STATE AND FEDERAL STATUTES IN QUESTION.

Petitioners contend that Section 21.914 of the Texas Education Code conflicts with 42 U.S.C. §1773 et seq., and the regulations thereto and is, therefore, invalid pursuant to the Supremacy Clause of the Constitution of the United States. More specifically, Petitioners contend that: participation in the School Breakfast Program is voluntary; Petitioners are the proper entity to decide whether to participate; and Section 21.914, in mandating participation, conflicts with the federal legislation.

Petitioners first claim that 42 U.S.C. §1773(a) grants them the right to decide whether to participate in the program. The statute reads in part:

> There is hereby authorized to be appropriated such sums as are necessary to ... assist the *States* through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs *in all schools which make application for assistance* and agree to carry

> out a nonprofit breakfast program in accordance with the chapter. (Emphasis added) 42 U.S.C. §1773(a).

However, as opposed to evidencing a Congressional desire to allow the Garland Independent School District to make a decision, this section demonstrates Congress' desire to provide for needy children by assisting the "States".

Other subsections of §1773 also evidence Congress' "state mindedness" in dealing with the problem of needy school children. Subsection (b)(1) speaks of the Secretary apportioning funds among the States. Subsection (c) requires that funds apportioned and paid to any State be disbursed by the State educational agency, Respondents herein, to schools selected by the State educational agency. Subsection (d) requires the State educational agency to establish eligibility standards. Therefore, Congress being "state minded" the state mandate does not conflict the federal statute.

Petitioners also rely on the regulations of the Department of Agriculture for the proposition that they are the proper entity to decide whether to participate. The regulation, 7 C.F.R. §220.7(a) states in part:

> The School Food Authority shall make written application to the state agency ... for any school in which it desires to operate the School Breakfast Program ..."

The "School Food Authority" is defined as "the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein." 7 C.F.R. §220.2(w). The Garland Independent School District is a creature of the Legislature of the State of Texas which was established pursuant to Title II, Chapter 19 of the Texas Education Code. As such, its

"legal authority" is a matter of state law. *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923); *City of Newark v. State of New Jersey*, 262 U.S. 192 (1923); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *Dallas Independent School District v. Edgar*, 255 F.2d 455 (5th Cir. 1976). The enactment of §21.914 removed any legal authority Garland Independent School District may have had to decide whether to participate in the program if it has one or more schools with at least ten percent eligible students. There is no state restriction on participation of school districts containing less than ten percent eligible students. Unlike the statute in *County of Los Angeles, California v. Adams*, 574 F.2d 607 (D.C. 1978), there is no specific statutory requirement that a local entity make a decision. Likewise, there is no indication that Congress sought to abrogate the states' power to alter the legal authority of its political subdivisions as a condition for the receipt of federal assistance.

In addition, the regulations, 7 C.F.R. §220.7(c), require tne "State educational agency ... to extend the benefits of the School Breakfast Program to children attending schools in areas where poor economic conditions exist." In mandating participation, if schools have ten percent or more eligible students, the state has decided that poor economic conditions exist in these schools and is fulfilling its obligation to extend the benefits of the program to students in these areas.

The legislative history of the first sentence of §1773(a) supports Respondents position that Congress sought to provide assistance to states in providing for needy children. The earlier version of the first sentence of §1773(a) read:

> There is hereby authorized to be appropriated for each of the fiscal years 1972 and 1973 not to exceed $25,000,000 to carry out a program to assist the *States* through grants-in-aid and

> other means to initiate, maintain, or expand nonprofit breakfast programs in schools. (Emphasis added)

This provision clearly evidences Congressional intent to assist the states in providing breakfast programs for needy children.

Congress, in 1872, decided to provide an open-ended authorization of funds in order to make the benefits of the program available to all needy children. See S. Rep. No. 92-1027, 92nd Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 3380, 3392. In providing the open-ended authorization, Congress did so by rewriting the statute to provide "such sums as are necessary [to fund the program] in all schools which make application ..." However, the statute retained the phrase "to assist the States through grants-in-aid ..."

Other provisions of the Statute and regulations authorize or, at the very least, evidence Congress' hospitality toward statutes such as Section 21.914. The State educational agency is required to: (a) receive applications from local school districts, Section 1773(a); (b) enter into contracts with local schools and school boards to run the breakfast program, 7 C.F.R. Section 220.7(a); set rates of disbursement, 7 C.F.R. Section 220.9; (d) decide which school districts will receive additional payments if the uniform national rates do not cover all costs, Section 1773(d), 7 C.F.R. Section 220.9(a). Under the earlier version of the program, when only limited funds were available, the State selected the schools which would participate in the program and they still choose which schools to reimburse if funds are insufficient to reimburse all schools participating. See 42 U.S.C. §1773(c). The State is also required to submit a plan demonstrating their intention to use the funds provided to the maximum extent practicable to reach needy children, 42 U.S.C. §1759a(e)(1)(C). Entrusting the performance of these functions to the states is, at the

the very least, inconsistent with the theory that Congress sought to insulate the local schools or school boards from State mandates such as Section 21.914.

Petitioners also allege that Section 21.914 seeks to change the requirements of the federal program by only requiring participation in those schools with ten percent or more eligible students. The Statute reads in part:

> If at least ten percent of the students enrolled in one or more schools in a school district are eligible for free or reduced price breakfasts under the National School Breakfast Program provided for by the Child Nutrition Act of 1966 (42 U.S.C. §1773), the governing board of the district shall participate in the program and make the benefits of the program available to all eligible students in said schools.
>
> Section 21.914, Texas Education Code.

This Statute is capable of two interpretations, neither of which would vary the operation of the federal program. One interpretation is that if the school district has at least one school with at least ten percent eligible students, the program must be made available to all students within the district. The other interpretation is that if a school district has one or more schools with at least ten percent eligible students, the program must be made available only to students in those schools. A federal district court has decided that if the program is offered within a school district, it must be offered in all schools which have eligible students. *Torres v. Butz*, 397 F.Supp. 1015 (N.D. Ill. 1975). Consistent with this ruling, state law mandates participation and federal law mandates that said participation be available to all eligible students. Therefore, the Texas Statute does not seek to alter the functioning of the federal program.

II.

ASSUMING A CONFLICT BETWEEN THE STATE AND FEDERAL STATUTES, THE SUPREMACY CLAUSE DOES NOT OPERATE TO INVALIDATE THE STATE STATUTE.

Assuming there is some conflict between the state and federal statutes, the supremacy clause, Article 6 Clause 2, U.S. Con., does not operate to invalidate the Texas Statute. This Court has stated the test for determining the invalidity of a state statute as "whether under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Goldstein v. California*, 412 U.S. 546 (1973). See also, *Florida Lime and Avocado Growers v. Paul* 373 U.S. 132 (1963). The purposes and objectives of Congress are made explicit in 42 U.S.C. §1773(g), which provides:

> as a national nutrition and health policy, it is the purpose and intent of Congress that the school breakfast program be made available in all schools where it is needed to provide adequate nutrition ... .

It cannot be said that the Texas mandate stands as an obstacle to the accomplishment and execution of this Congressional purpose.

Numerous Circuit Courts of Appeals have had occasion to address the question of invalidation of state statutes pursuant to the supremacy clause. The First Circuit in *Doctors Hospital, Inc. v. Silva-Recio*, 558 F.2d 619 (1st Cir. 1977) has stated the test thusly:

> Unless there is a specific prohibition in the federal law, a state law which complements federal law is valid. *Id.*

Petitioners have not cited, nor can they cite, any specific prohibition of the action taken by the legislature of the State of Texas. The Fifth Circuit in *DeKalb County, Georgia v. Henry C. Beck Company*, 382 F.2d 992 (5th Cir. 1967), and cases cited therein, has ruled that the application of the supremacy clause requires a determination of and balancing of, state and local action against federal policy. The state action involved in this case is the mandating of participation in the school breakfast program in certain situations. Section 21.914, Texas Education Code. The federal policy involved is the provision of the benefits of the school breakfast program in all schools where it is needed to provide adequate nutrition. 42 U.S.C. §1773(g). The necessity of this brief indicates that, absent the Texas mandate, the needy school children of the Garland Independent School District would not reap the benefits of the school breakfast program.

CONCLUSION

For the reasons advanced above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas B. Owen, Assistant Attorney General of Texas, attorney for Respondents, certify that three copies of the above and foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, certified, postage prepaid, addressed to: Messrs. Earl Luna and Thomas B. Murto, III, Luna, Murto and Vorpahl, 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, on this the ___ day of July, 1979.

DOUGLAS B. OWEN